UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

C.W. WRIGHT CONSTRUCTION COMPANY, LLC,

and **Case 5-CA-180732**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 70

REPLY TO THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO ACCEPT RESPONDENT'S SETTLEMENT PROPOSAL

Respondent C.W. Wright Construction Company, LLC ("Respondent" or "C.W. Wright"), by its undersigned counsel, respectfully submits this Memorandum in reply to the opposition filed by the General Counsel (GC) to Respondent's Motion to accept its settlement proposal. For the reasons set forth below, the opposition is without merit and Respondent's Motion should be granted.

I. INTRODUCTION

It is important to emphasize that no party challenges in principle the ability of the Administrative Law Judge (ALJ) to accept a settlement over the objections of the GC and the Charging Party in a proper case. *See e.g. United States Postal Service*, 364 NLRB No. 116 (2016)(hereinafter *USPS*). Rather, the GC contends that (a) "[d]eletion of the default language in the settlement precludes a finding of a full remedy, as Respondent has not proposed a consent order with cease-and-desist language that General Counsel would receive through a Board Order," (b) "deletion of the default language does not provide the General Counsel with the same remedy that would result if the counsel for the General Counsel prevailed in litigation," and (c) "inclusion of a non-admissions clause in Respondent's current proposed Motion is less than a full remedy for settlement." *See* GC Opposition at pp. 1-4. As more fully set forth below, the

GC's contentions are without merit, and because Respondent is nonetheless willing to cure any perceived defects, Respondent's motion should be granted.

II. DEFAULT LANGUAGE IS SIMPLY NOT A REMEDY AVAILBALE TO THE GC EVEN IN CASES WHERE THE GC FULLY PREVAILED IN LITIGATION

First, the GC argues that the absence of default language somehow deprives the GC of a full remedy and therefore, the default language *is required*. There is absolutely no support for the GC's claim. The GC contends:

> In *USPS*, the respondent did not propose removing the default language entirely, but rather sought to limit the default's enforceability for a period of six months following the case closure. Id. at n. 7. The Board in *USPS* found that inclusion of this limitation of the default language precluded a finding that it provided a full remedy for the violations alleged in the complaint. *Id.*

The GC misconstrues the holding in *USPS*. In fact, the majority in *USPS* specifically notes that the inclusion of default judgment language *is not required* to constitute full relief in all cases[1]:

> The dissent further errs in stating that under today's decision, "the respondent must agree to accept a default judgment." As any reader of the decision will confirm, the decision says no such thing. The consent order before us, which we disapprove for other reasons, provides for entry of a default judgment in the event that the respondent violates the order, but only because the respondent proposed that provision. One need look no further than *General Electric*, the original "full remedy" consent-order case, to find an approved consent order that contains no provision for a default judgment. *See* 188 NLRB at 855-856.

In this case, Respondent certainly did not propose the default language at issue, and therefore the default language cannot be viewed as "necessary" for a full remedy as the GC contends. Respondent's motion should be granted.

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[1] Respondent does not agree with the Board's newly announced standard *USPS*, as the Board in *General Electric* did not say it would only approve consent settlement agreements that provide "a full remedy." Nevertheless, Respondent in this case has proposed a settlement agreement that provides for "full relief" as contemplated by the Board in *USPS*.

III. RESPONDENT DOES NOT OBJECT TO THE ENTRY OF A CONSENT ORDER ON THE TERMS SET FORTH IN ITS PROPOSED SETTLEMENT

Next, the GC contends that full relief is not offered because the Respondent's proposed language does not provide for a consent order and the entry of a court judgment, noting that "Respondent has not proposed a consent order, but rather proposes the Judge accept an informal settlement over the objections of the Charging Party and counsel for the General Counsel." GC Opposition at 3-4, FN 2. It should first be noted that Respondent's proposal followed the GC's initial proposal to resolve the case through an informal settlement agreement, and therefore any reference to the same was merely a reflection of the GC's preferred method of resolution of the underlying allegations. Of course, the absence of a consent order does not, on its own, preclude an ALJ from accepting the terms of an informal settlement agreement proposed by a charged party. *See* NLRB Casehandling Manual, Part 1, Unfair Labor Practice Proceedings (Feb. 2016) (ULP Manual), § at 10150.

Additionally, the GC's recent affinity for default language does not fundamentally alter the ability of the GC to seek enforcement of violations of settlement agreements, even informal settlement agreements. Prior to January 12, 2011, the standard practice was *not* to include default language in settlement agreements. *See* Memorandum GC 11-04 (January 11, 2011). Nevertheless, settlement agreements were routinely enforced. Moreover, the GC permits Regional Directors to approve settlements without default language in cases where there has been no determination on the merits. Memorandum OM 14-48 (April 10, 2014) at 2. It is an inaccurate overstatement, then, to contend that the absence of default language here renders Respondent's proposed settlement agreement without any "practical effect" and leaves the Board with "no recourse." Indeed, regardless of the existence of default language, the GC will need to prove facts that establish a breach of the settlement agreement. *See* GC 11-04 at 3; Memorandum OM 14-48 at 5. Once this is done, any record created to prove any unfair labor

practice that might also establish a breach of a settlement agreement can be incorporated into a proceeding seeking to enforce the settlement agreement without the need for further litigation. *See* Memorandum OM 14-48 (April 10, 2014) at 5-6.

For these reasons, a settlement without default language places no limits on the Board's ability to enforce its settlement agreement and places no greater burden on the GC than any that exist with default language. The GC's default language, by contrast: requires Respondent to forfeit statutory rights to defend against unproven claims; denies Respondent due process as to unproven claims; imposes upon Respondent punitive sanctions not allowed by the Act; and improperly revives claims that should remain settled as the parties agreed. Despite the foregoing, if all that the GC can offer to claim that Respondent's settlement proposal does not offer full relief within the meaning of *USPS* is that the proposed agreement is not in the form of a consent order, and the ALJ agrees, this can be remedied easily by inserting the appropriate sentence into the settlement document, and Respondent will have no objection to this cure.

IV. RESPONDENT'S SETTLEMENT OFFERS FULL RELIEF EVEN THOUGH IT CONTAINS A NON-ADMISSIONS CLAUSE

Respondent's settlement proposal consisted of adopting the GC's proposal except for the default language. *Compare* Respondent's Motion Exhibits 1 and 2. Thus, as to the alleged illegal statements, Respondent agreed to refrain from making such statements and posting the GC's proposed notice language, without change. [2] Exhibit 4, Respondent's Motion Exhibit 1 at 3-4. This is all the relief that the GC could have hoped to obtain if the claims had been litigated successfully to conclusion. *E.g. USPS*, sl. op. at 3. (typical remedy for statements violating

[2] While Respondent had proposed slight revisions to one of the proposed notice provisions, Respondent hereby rescinds its proposed revisions to the notice posting, thereby leaving the ALJ with a single issue- whether the default language *alone* renders Respondent's proposal deficient under *USPS*.

8(a)(1) is a cease and desist order and a notice posting). The GC claims that full relief is not offered by Respondent because the Respondent's proposal contains non-admissions language. GC Memorandum at 4. Respondent has already explained that the Board in *USPS* said that non-admissions language does not prevent a finding of full relief, and the GC agrees with Respondent's position. Respondent's Motion to Accept Respondent's Settlement Proposal at 4 citing *USPS*, sl.op. at 3 fn. 9; GC Opposition at 4. Together with Respondent's decision to accept a consent order and Respondent's agreement to rescind any previously proposed revisions to the notice language, any lingering contention that the presence of non-admissions language does not offer full relief is wrong as a matter of law.

V. CONCLUSION

For the reasons set forth above, as well as those brought to the attention of the ALJ previously, Respondent's Motion should be granted and the settlement proposal attached to as Exhibit 1 to Respondent's Motion should be accepted.

Respectfully submitted this 6th day of March, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of March 2017, the foregoing RESPONDENT'S REPLY TO THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO ACCEPT RESPONDENT'S SETTLEMENT PROPOSAL was electronically filed, that an original and four copies were sent by Federal Express to the Regional Director, and that a service copy was sent by e-mail and/or Federal Express as applicable to each of the other individuals listed below as provided on the NOTICE attached to the Complaint after page 6:

Mr. Rick Fridell, Business Representative
International Brotherhood of Electrical
Workers Local Union 70
3606 Stewart Road
Forestville, MD 21061

Charles Posner, Regional Director
National Labor Relations Board, Region 5
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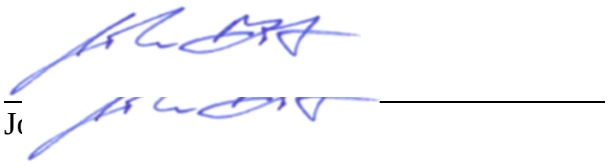

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